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# The Future of Legal Ethics

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# The Future of Legal Ethics

Geoffrey C. Hazard, Jr.†

The practice of law deals mostly with the getting and keeping of money.

—An Old Lawyer

## I. INTRODUCTION

### A. The "Crisis" in Legal Ethics

Dissatisfaction with lawyers is a chronic grievance,<sup>1</sup> and inspires periodic calls for reform.<sup>2</sup> Nevertheless, the contemporary problems of the American legal profession seem to run deeper than in the past. There are more lawyers today, both proportionately and absolutely, than at any other time in recent history.<sup>3</sup> There is much greater public consciousness of lawyers' work, which is now the subject of regular coverage in newspapers, magazines, and television

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† Sterling Professor of Law, Yale University. I am grateful for the help of my colleague Professor Susan P. Koniak, of the University of Pittsburgh, in connecting some of the links in the present analysis. I also much appreciate the excellent work of John D'Amato, Yale Law School '91, in compiling source references.

1. An oft-cited expression of dissatisfaction with the administration of justice is contained in R. POUND, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in ROSCOE POUND AND CRIMINAL JUSTICE 57 (1965). The classic statement of hostility toward lawyers is by Shakespeare: "the first thing we do, let's kill all the lawyers." *Henry VI, Pt. II*, Act IV, scene ii, line 86.

2. See, e.g., LAW IN A CHANGING AMERICA (G. Hazard ed. 1968); Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); ". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986) [hereinafter *ABA Blueprint for Professionalism*] (collecting papers from 1968 Conference on Access to Justice). In 1900, the profession responded to reformists' demands by founding the Association of American Law Schools, designed to improve the legal profession by establishing higher standards for legal education. *Articles of Association Adopted at Saratoga, N.Y., August 28, 1900*, Art. 1, PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 1900-1905 (n.d.). In 1908, the American Bar Association promulgated its Canons of Professional Ethics, which contemplated the improvement of the legal profession by the clarification and enforcement of its norms. ABA CANONS OF PROFESSIONAL ETHICS Preamble (1936).

3. In 1950 there were approximately 176,000 lawyers and judges; in 1970, 260,000; and in 1987, an estimated 707,000. STATISTICAL ABSTRACT OF THE UNITED STATES 230 (86th ed. 1965); *id.* at 373 (97th ed. 1976); *id.* at 388 (109th ed. 1989). This computes to 11.6 lawyers and judges per 10,000 in the population in 1950, 12.7 in 1970, and 29.0 in 1987—a dramatic increase. See *id.* at 402 (102d ed. 1981); *id.* at 18 (109th ed. 1989).

serials.<sup>4</sup> Yet the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society.<sup>5</sup>

A focal point of this frustration is legal ethics. This concern is simple, even simplistic: Lawyers should have "better" ethics. The question then becomes, how can this be made to happen? So far the answer has been, stricter rules that are better enforced. Hence, the comprehensive textual revision of the rules of ethics;<sup>6</sup> more-exacting requirements for education in "professional responsibility";<sup>7</sup> expansion of the machinery for disciplinary enforcement;<sup>8</sup> and the burgeoning of legal ethics as a subject of judicial decisions,<sup>9</sup> legal treatises,<sup>10</sup> and academic discourse.<sup>11</sup>

These approaches have focused on two general questions: 1) Is the content of the profession's stated norms—e.g., the rules governing conflicts of interest, the protection of client confidences, and so on—what it should be? and 2) Do lawyers conform to those norms? The present analysis, however, explores the ethics crisis at a deeper level by examining the basic ethos of the profession—that is, its identity and place in the social system. My root question is definitional: Who is "we" when it is said "We lawyers . . .?"

### B. *Autonomy or Dependency*

Like any other social institution, the legal profession can be considered either as autonomous or as a creature of its environment. Considered as autonomous, lawyers define their own identity, determine the nature of their work, and maintain the profession as an independent constituent in society. Viewed as creatures of their environment, lawyers are primarily identified by names that

4. See, e.g., *At the Bar*, N.Y. Times; *Law*, Wall St. J.; law departments of *Time* and *Newsweek*; *The American Lawyer*; *The National Law Journal*. TV programs include *L.A. Law* and *Equal Justice*.

5. See, e.g., *ABA Blueprint for Professionalism*, *supra* note 2, at 253 (noting that "lawyers as a group are blamed for some serious public problems").

6. The American Bar Association's present formulation of ethical principles is the MODEL RULES OF PROFESSIONAL CONDUCT (1983).

7. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(a)(iv) (1987) ("The law school shall . . . require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession . . . including the ABA Model Code of Professional Responsibility . . ."). By 1986, bar associations in over 30 states required candidates to pass the Multistate Professional Responsibility Examination. *ABA Blueprint for Professionalism*, 243 F.R.D. at 267.

8. See, e.g., CAL. BUS. & PROF. CODE § 6079.1 (West 1990) (vesting authority to preside over attorney disciplinary hearings in administrative law judges as part of an alternative procedure supplementing the disciplinary power exercised by courts over lawyers under CAL. BUS. & PROF. CODE § 6100 (West 1990)).

9. See, e.g., Law. Man. on Prof. Conduct 201:101 (ABA/BNA) (discussing judiciary's assertion of power to regulate the bar).

10. E.g., G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* (2d ed. 1990); R. MALLIN & J. SMITH, *LEGAL MALPRACTICE* (3d ed. 1989); C. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

11. Comprehensive bibliographies of the voluminous literature on legal ethics can be found in H. DRINKER, *LEGAL ETHICS* (1953); F. ELLISTON & J. VAN SCHAICK, *LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE* (1984); D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); and C. WOLFRAM, *supra* note 10.

others give them ("mouthpiece," for example), carry out tasks for the benefit of other social agents, and cohere as a profession primarily in response to external pressures.

Analysis of the legal profession's role in society is strongly influenced by one's initial decision as to whether the profession is autonomous or dependent. If lawyers are considered to have substantial control over their professional identity and destiny, then the profession's ethical norms constitute standards of self-government. For example, having professed a commitment to certain minimum standards of competence, an autonomous bar would be open to the criticism that a substantial portion of its membership is unable to perform basic legal skills.<sup>12</sup>

On the other hand, if the profession takes its shape in response to pressures and demands from outside forces, then its ethical norms are best interpreted as products of those forces. The bar's ambiguous standards of competence, for example, can be attributed to such external realities as the wide variety of constituencies seeking legal services, the diversity of aspirants for legal careers, and—above all—fundamental tendencies in the American social environment: its unacknowledged social stratification, disdain for elitism, and aversion to regulatory controls on personal behavior.

This essay will attempt to integrate these two approaches to interpreting the profession's ethos. I proceed on the proposition that, historically, the American legal profession's basic function in our society has been to aid the development and protection of business property within a political system committed to both popular government and constitutional restraints on government. Performance of this function has depended on a linkage of the bar with the courts, on the one hand, and with the business community on the other. Using litigation, the contract process, the rules of corporate law, and political maneuvering, the profession is primarily engaged for its clients in counterbalancing the vagaries of popular government with the pressures of the market. This is an unpopular and morally suspect task in a society ostensibly dedicated to democratic principles and open political process. Nevertheless, core ethical norms governing the practice of law facilitate the performance of this complex function. These rules have conferred on the legal profession a distinct, constitutionally based role in the governance of the community at large.

However, over the last twenty-five years or so the traditional norms have undergone important changes. One important development is that those norms have become "legalized." The rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by formal adjudicative disciplinary process. As part of this change the courts have imposed various regulations, the most significant of which concern the composi-

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12. Burger, *A Sick Profession?*, 5 TULSA L.J. 1, 1 (1968) ("[T]he majority of lawyers who appear in court are so poorly trained that they are not properly performing their job . . .").

tion of the profession and access to legal services.<sup>13</sup> The legalization process has resulted in the disintegration of the profession's sense of self and of the "narrative" that helped to define and defend its social boundaries. At the same time the profession's traditional function of protecting business property has suffered from a decline in legitimacy. Thus, the legal profession's norms have become simultaneously more technically elaborate and more rootless in fundamental political and economic presupposition. As a result, neither the public at large nor lawyers themselves have a clear sense of what the legal profession "is." In this respect the profession may be a mirror of contemporary American society as a whole; whether we lawyers can reestablish an independent identity for our profession is likely to depend on the success of parallel reconceptualizations of America's basic political and economic institutions, particularly the relationship between popular sovereignty in government and legal protection of business property.

## II. THE LEGAL PROFESSION'S BASIC NORMS

The legal profession's basic norms are expressed both in its "narrative" and in its rules. There has been remarkable continuity in the substance of both.

### A. *The Profession's Narrative*

The concept of "narrative" has attained a prominent position in legal philosophy.<sup>14</sup> A narrative is a story about people; it is specific in time, place, participants, circumstances, action, and outcome, and begins with some version of "once upon a time." The action and fate of the participants reveals a moral. The Bible is narrative, as are Greek mythology, traditional folktale, Shakespeare's histories and tragedies, and the modern novel and soap opera. In the legal tradition, narratives include the classic cases: *Hadley v. Baxendale*<sup>15</sup> is a narrative in contract law, *Palsgraf*<sup>16</sup> one in tort law. Legal briefs, opening statements to juries, and lawyer "war stories" are narratives. Most professional "skills training" is communicated through narrative—how a breakthrough was accomplished in cross-examination, or how an opposing negotiator was induced to change her mind, or how a case was lost that should have been won.

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13. Changes in the composition of the profession, and in the rules governing recruitment into it, have benefited us all by helping disadvantaged groups achieve fuller participation in American society. However, the conceptual basis of these changes has been ambiguous. Disadvantaged groups demand equality and freedom from discrimination, but complete equality is dissonant with the concept of legally protected business property. Hence, the changes in the profession's composition have complicated the profession's task of self-definition and legitimization.

14. See, e.g., Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990).

15. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

16. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

A narrative can also convey more global definitions of a person or group. The familiar story about young George Washington and the cherry tree projects Washington's life-long character—the essence of the man. The tale of Sergeant York's heroism during World War I conveys a global conception of the American citizen-soldier; *Red Badge of Courage* and *Born on the Fourth of July* project different images of the same subject.

The narrative of the American legal profession conveys a similarly clear ideal: that of the fearless advocate who champions a client threatened with loss of life and liberty by government oppression. An early version of the narrative tells of lawyer Andrew Hamilton's defense of prerevolutionary patriot John Peter Zenger against the charge of criminal libel. The story is that Hamilton undertook the representation despite grave threat to his position and professional livelihood, fearlessly standing up against the Royal Governor to vindicate free speech and the colonists' right of self-government.<sup>17</sup>

A later version of the classic narrative is Abraham Lincoln's devastating cross-examination of a lying witness during a murder prosecution against his client. With the aid of the *Farmer's Almanac* Lincoln proved there was no moon on the night in question, so that the witness could not have seen what he said he had. Lincoln thus rescued an innocent citizen from both private evil and prosecutorial authority.<sup>18</sup>

Modern versions of the same story include the case of *Powell v. Alabama*<sup>19</sup> (otherwise known as the "Scottsboro" case), in which a devoted advocate saved indigent Black youngsters from execution at the hands of racist prosecutors. A white-collar version is Joseph Welch's defense of honest government officials against the oppression of the McCarthy hearings.<sup>20</sup> Since the narrative is politically neutral, it is also exemplified in Brendan Sullivan's defense of Oliver North before a different set of government inquisitors;<sup>21</sup> Abe Fortas' brief on

17. See, e.g., Finkelman, *The Zenger Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 21, 22, 24, 34, 36 (M. Belknap ed. 1981).

18. Donovan & Wellman, *Cross-Examiner*, in LINCOLN TALKS: A BIOGRAPHY IN ANECDOTE 23, 25 (E. Hertz ed. 1939) ("Following this climax, Mr. Lincoln moved the arrest of the perjured witness as the real murderer, saying: 'Nothing but a motive to clear himself could have induced him to swear away so falsely the life of one who never did him harm!'").

19. 287 U.S. 45 (1932). For discussions of the *Scottsboro* case, see Blodgett, *Windows into the Legal Past*, 71 A.B.A. J. 44, 45-46 (1985) (relating prejudice surrounding *Scottsboro*); Landsman, *When Justice Fails*, 84 MICH. L. REV. 824, 836, 838-39 (1986) ("The [Alabama Supreme Court] unanimously refused to credit the clearest sort of evidence of racial discrimination in jury selection and upheld a trial of the most dubious sort."); N.Y. Times, July 27, 1931, at A14, col. 7 (letter quoting editorial published in *Selma Times-Journal*: "The trials were conducted under the protection of soldiers with fixed bayonets and in a courtroom surcharged with racial hatred . . . . Any fair-minded person knows that a court proceeding under such circumstances is a travesty on the constitutional guarantees of a 'fair and impartial trial' . . . .").

20. D. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 424-30, 457-64, 471 (1983).

21. See, e.g., N.Y. Times, July 6, 1987, at A10, col. 1 ("Congress insisted that Lieut. Col. Oliver L. North could not testify in public without first being grilled in private . . . . But Brendan V. Sullivan . . . wouldn't budge . . . . In the end, despite angry ruminations about contempt citations and worse, Congress blinked . . . . That was no surprise to veteran Washington lawyers and prosecutors who have seen Mr. Sullivan in action.").

behalf of an indigent client in *Gideon v. Wainwright*,<sup>22</sup> and Thurgood Marshall's fight for the civil rights of blacks during his career with the NAACP.<sup>23</sup>

Like all narratives, the legal profession's has a moral. Its classic articulation grew out of Lord Brougham's defense of Britain's Queen Caroline. The Queen faced an attempt by her husband to obtain a divorce by ruining her name and thus her fortune and position in society. The threatened charge was that she had committed adultery. Against this threat Lord Brougham let it be known that he would raise the defense of recrimination, proving that the King was himself guilty of adultery and, worse, that he had secretly married a Catholic, hence jeopardizing his title to the throne. Brougham stood fast against the menaces of Crown and Privy Council, securing a favorable settlement by counter-threats.<sup>24</sup> Brougham's statement of the moral basis of his actions remains the classic vindication of the lawyer's partisan role:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>25</sup>

The legal profession's basic narrative has been sustained over two centuries, notwithstanding pervasive changes in American society and in the profession itself. It pictures the lawyer as a partisan agent acting with the sanction of the Constitution to defend a private party against the government. In the basic narrative the private party is an individual, the proceeding is criminal or quasi-criminal, and the defendant's life or liberty is at stake. The defending attorney's cause is always just, for the narrative holds that government is inevitably heavy-handed and misguided. The lawyer is thus an instrument of both liberty and political justice.

The actual practice of most lawyers is somewhat different. The private client is more likely to be a business organization than an individual; the transaction or proceeding is probably civil or regulatory rather than criminal; the outcome

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22. 372 U.S. 335 (1963). For a discussion of the Fortas brief, see B. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 86-89 (1988) (brief was "considered a model for its clarity and brevity" and oral argument was among best heard by Court).

23. See, e.g., M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 45-69 *passim* (1987) (detailing Justice Marshall's career with the organization); see also T. SHAFFER, *FAITH AND THE PROFESSIONS* (1987) (professional narratives).

24. Obtaining advantage in a civil case by threatening criminal prosecution is in some circumstances illegal as extortion. As far as I know, this aspect of Lord Brougham's storied strategy has not been criticized.

25. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821), quoted in Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

is more likely to be a matter of property or money than life or liberty; and the justice of the cause is probably indeterminate.<sup>26</sup> Nevertheless, the partisanship principle remains at the core of the profession's soul: "[A]n advocate, in the discharge of his duty, knows but one person . . . though it should be his unhappy fate to involve his country in confusion."<sup>27</sup>

In the practice of the typical lawyer, the narrative thus transfers the moral from the sympathetic case of an innocent individual subjected to persecution in a criminal proceeding to the less appealing one of a business enterprise fending off government regulation or the civil claims of other private entities. The logic behind the transfer is that, just as individual life and liberty are always at risk from misguided government, so are business enterprise and property rights.<sup>28</sup> However, this parallel between legal partisanship for an accused individual and legal partisanship for a business enterprise is not new; it was established in the Constitution and has long been evident in law practice.

The Bill of Rights expresses the parity of person and property: "No person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>29</sup> Since the beginning of the Republic, this theme has been manifest in the lives of the central figures in our professional narrative. Andrew Hamilton, the lawyer in the Zenger case, had a general practice centering on matters of property;<sup>30</sup> Henry Lord Brougham handled a wide variety of matters for the rich and powerful of his day;<sup>31</sup> Abraham Lincoln was a litigator "[m]ore than half [of whose] cases, at least as shown by [Illinois] Supreme Court records, involved either real property and mortgages, simple contracts, or procedure";<sup>32</sup> Louis Brandeis "practiced commercial law, representing businessmen in their dealings."<sup>33</sup> Representation of business interests has been the legal hero's ordinary vocation.

The classic articulation of the nexus between protection of individuals, which is the theme of the profession's narrative, and protection of property, which is the core of the profession's practice, appears in *Boyd v. United States*.<sup>34</sup> That decision is a seminal integration of the Fourth and Fifth Amendments:

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26. Cf. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS* (G. Gawalt ed. 1984) (arguing that legal profession's classical conception, that lawyers must construct a unified science of law and apply it through reformed institutions, died at the turn of the century and has yet to be replaced by a new theory giving "normative direction to its practical tasks").

27. See 2 TRIAL OF QUEEN CAROLINE, *supra* note 25 and accompanying text.

28. Correlatively, the profession's engagement to protect business from heavy-handed government involves a commitment of some sort to protect the rights of individuals from government excess.

29. U.S. CONST. amend. V.

30. B. KONKLE, *LIFE OF ANDREW HAMILTON* 5-7 (1941).

31. See generally 2 H. BROUGHAM, *LIFE AND TIMES OF HENRY LORD BROUGHAM* (1871).

32. J. FRANK, *LINCOLN AS A LAWYER* 6 (1961).

33. P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 38 (1984).

34. 116 U.S. 616, 630 (1886).



The principles [of those Amendments] . . . apply to all invasions on the part of government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .<sup>35</sup>

Viewed in this way, the legal profession's basic narrative is a defense of due process.<sup>36</sup> The lawyer's work consists of resistance to government intervention in the lives, liberty, or property of private parties.

### B. *The Profession's Basic Rules*

Just as the profession's narrative has remained essentially the same for two centuries, so have the basic ethical rules of representation that the narrative both presupposes and illustrates. The rules enforce three core values: loyalty, confidentiality, and candor to the court. The duties of loyalty and confidentiality legitimate the representation of clients, including business clients. The duty of candor to the court legitimates the bar's affiliation with the judiciary.

The American Bar Association's 1908 Canons captured the tradition received from early days. A brief comparison of those Canons with the present-day rules will demonstrate the continuity.

Concerning conflict of interest, Canon 6 of the 1908 Canons provided:

It is the duty of a lawyer . . . to disclose to the client all the circumstances of his relations to the parties . . . which might influence the client in the selection of counsel . . . .

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.<sup>37</sup>

Essentially similar is Rule 1.7 of the 1983 Rules of Professional Conduct, which provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to

35. *Id.*

36. Burridge, *Levi-Strauss and Myth*, in *THE STRUCTURAL STUDY OF MYTH AND TOTEMISM* 91, 92 (E. Leach ed. 1967) ("Myths are reservoirs of articulate thought on the level of the collective. . . . They represent the thought of people about themselves and their condition.").

37. ABA CANONS OF PROFESSIONAL ETHICS Canon 6 (1936).

another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation . . . .<sup>38</sup>

Second, concerning confidentiality, Canon 37 stated that a lawyer has a "duty to preserve his client's confidences [which] outlasts the lawyer's employment, and extends as well to his employees . . . ." <sup>39</sup> The Canon recognized three significant qualifications to this duty. First, disclosure was permitted with the client's "knowledge and consent."<sup>40</sup> Second, "if a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the accusation."<sup>41</sup> The third exception concerned client crime or fraud, which the Canons handled in complicated and perhaps equivocal terms. Canon 37 stated that "[t]he announced intention of a client to commit a crime is not included within the confidences which [the lawyer] is bound to respect."<sup>42</sup>

Rule 1.6 of the 1983 Rules of Professional Conduct is structured along the same lines. The basic rule is that "[a] lawyer shall not reveal information relating to representation of a client . . . ." <sup>43</sup>

The exceptions under Rule 1.6 permit disclosure 1) if the client "consents after consultation," or 2) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ." <sup>44</sup> A third exception, dealing with client crime, was addressed in terms as complicated and

38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

39. ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1936).

40. *Id.*

41. *Id.*

42. *Id.* Canon 41, without directly acknowledging its relationship to Canon 37, required disclosure of client confidences where the client was engaged in fraud. That Canon stated:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

*Id.* Canon 41.

43. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Rule 1.6 has an additional qualification permitting disclosures "that are impliedly authorized in order to carry out the representation . . . ." *Id.* This authority was implied by law under the old Canons. *See, e.g.,* *Smith v. Bentley*, 9 F.R.D. 489 (S.D.N.Y. 1949) (where act was done on advice of attorney, advice of attorney is in issue and is discoverable); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 113 (Tent. Draft No. 3, 1990). Moreover, the term "confidences," which is used in both Canon 37 and the Code of Professional Responsibility, DR 4-101(C)(1), is a narrower category than "information relating to representation," the broad term used in Rule 1.6, and connotes information as to which there is *not* implied authority to disclose. *Compare* ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1936) *and* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1986) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). Rule 1.6(b), dealing with disclosure in legal controversy with the client, goes somewhat further, for it also allows disclosure "[t]o establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.* Rule 1.6(b). These expansions of the exception are not trivial, but they are structurally incidental and probably statistically insignificant.

equivocal as those of the Canons. Recognizing the problem of client fraud, Rule 1.6(b)(1) permitted disclosure "[t]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>45</sup> However, the Comment to Rule 1.6 states: "Neither this Rule nor [other provisions in the Rules] prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."<sup>46</sup>

In practical effect, Rule 1.6 as construed by this language in the Comment covers substantially the same ground as did Canon 41.<sup>47</sup>

Third, concerning the duty of candor to the court, the key question is how a lawyer should deal with a client who perjures herself.<sup>48</sup> The Canons were equivocal on this subject.<sup>49</sup> This equivocation appears to have resulted from a combination of presupposition—that submission of perjured testimony was obviously improper—and squeamishness about openly addressing such a disgusting subject. Canon 29 stated that "[t]he counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities";<sup>50</sup> Canon 15 warned that "[t]he office of attorney does not permit . . . chicane";<sup>51</sup> and Canon 41 directed that a lawyer must take rectifying steps when he "discovers that some fraud or deception has been practiced . . . upon the court."<sup>52</sup>

45. *Id.*

46. *Id.* comment.

47. ABA CANONS OF PROFESSIONAL ETHICS Canon 41 (1936). Canon 41 makes disclosure of fraud mandatory if the client does not rectify it, while disclosure is discretionary according to the Comment to Rule 1.6. However, when a client is involved in a fraudulent transaction, a lawyer is at risk of criminal or civil liability as an accessory if the transaction is consummated. If account is taken of this influence, the lawyer is required as a practical matter to make some kind of self-protective disclosure if the client is unwilling to rectify the situation. In 1 G. HAZARD & W. HODES, *supra* note 10, Rule 1.6, at 106, this effect of the general law on the rule of confidentiality is called a "forced" exception.

48. See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel not violated where attorney refuses to cooperate in presenting perjured testimony); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (where attorney knows that client has committed perjury, attorney must disclose perjury; where attorney knows that client intends to commit perjury, disclosure of anticipation is not mandatory, but attorney must inform client, inter alia, of attorney's duty to disclose perjury to the court); M. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 27-41 (1975) (discussing perjury as "the criminal defense lawyer's trilemma." *Id.* at 27); Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1913-15 (1988) (distinguishing between ethical and constitutional dimensions of the "client perjury dilemma").

49. Compare Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951) ("[A] lawyer may not lie to the court. But it may be a lawyer's duty not to speak.") with Drinker, *Some Remarks on Mr. Curtis' "Ethics of Advocacy,"* 4 STAN. L. REV. 349, 351 (1952) ("Mr. Curtis gives the impression that . . . the successful and happy lawyer is one who may use almost any subterfuge . . . . Nothing could be farther from the truth . . . the last two sentences of . . . Canon [15] mean just what they say"). See generally Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 650 (1979) ("inescapable conflict" brought about by client's perjury between lawyer's duty to be truthful to court and lawyer's duty to give effective representation requires that "some form of uneasy compromise" be made, but is ultimately insoluble).

50. ABA CANONS OF PROFESSIONAL ETHICS Canon 29 (1936).

51. *Id.* Canon 15.

52. *Id.* Canon 41.

The 1983 Rules, on the other hand, directly addressed the perjury issue. Rule 3.3(a)(4) provides: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."<sup>53</sup> However, what it means to "know" that evidence is false and what might be "reasonable remedial measures" are still under debate.<sup>54</sup> Hence, in the matter of client perjury the Rules as understood perpetuate the ambiguity in the Canons.

Taken together, the profession's basic rules paint a picture of protagonists who are faithful to client interests under a governing but qualified obligation of truthfulness in dealing with the courts (in their role as advocates) and in conducting business transactions (in their role as legal counselors). The structure of the Rules is simultaneously a self-definition and a reflection of the functions that the profession's clientele call upon it to perform.

### III. "LEGALIZATION" OF THE PROFESSION'S GOVERNING NORMS

I have tried to show that the content of the legal profession's narrative and core ethical rules, as pronounced in the 1908 Canons, has been preserved largely unchanged in today's Rules of Professional Conduct. However, the form in which those rules are expressed has changed dramatically. What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations.

#### A. *From Canons to Code to Rules*

The Canons gave voice to an ethical tradition going back at least as far as the first part of the nineteenth century.<sup>55</sup> In authorship, the Canons were fraternal admonitions, promulgated neither by the legislature nor the courts, but by the bar itself.

Two notable nineteenth-century formulations of the legal profession's ethical principles were written by David Hoffman<sup>56</sup> and George Sharswood.<sup>57</sup> Their

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53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

54. See, e.g., *United States v. Long*, 857 F.2d 436, 444 (8th Cir. 1988) (case remanded for evidentiary hearing on issue of whether criminal defendant's attorney had "firm factual basis" for his belief that his client intended to perjure himself and was therefore justified in reporting possibility of his client's perjury to court); *In re Grievance Committee (John Doe)*, 847 F.2d 57 (2d Cir. 1988) (civil witness); Reiger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985) (perjury by criminal accused).

55. See, e.g., Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979) (influence of early "republicanism" on development of legal code of ethics); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1087-91 (1978) (discussing origins of attorney-client privilege in the New World); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928) (relating the attorney-client privilege to early Roman law).

56. D. HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836).

flavor is indicated by the following passages from Sharswood's lectures. It is clear from his language that Sharswood saw himself as imparting the mores of right-thinking members of the bar—what anyone who was a lawyer of substance would know—to new bar entrants for the purpose of assuring their proper assimilation into the legal fraternity. On the conduct of collegial relationships, for example, Sharswood observed:

A very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren . . . . He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them . . . . He should never unnecessarily have a personal difficulty with a professional brother. He should neither give nor provoke insult . . . . Let him shun most carefully the reputation of a sharp practitioner.<sup>58</sup>

As to the duty owed the client, Sharswood advised: "Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner."<sup>59</sup>

The Canons presupposed that right-thinking lawyers knew the proper thing to do and that most lawyers were right-thinking. They expressed the viewpoint of an economically advantaged social stratum distinguished by its intellectual accomplishment, attachment to the business community, and preoccupation with civic-political affairs. The Canons were norms governing lawyers' participation in administering the law in the service of social stability and the progress which such stability was thought to assure. As admonitions emanating from a merely private organization, the Canons had no direct legal effect, either in grievance proceedings against lawyer misconduct or in civil actions for legal malpractice. In such proceedings, the Canons functioned not as enforceable legal standards but only as evidence of such standards.<sup>60</sup>

The transformation of these norms into an enforceable legal code resulted from two overlapping interactions between the legal profession and the courts. The bar's leadership sought the aid of the courts in establishing firmer and more comprehensive control over the profession. This effort took three principal forms: first, creation of the "integrated bar," a state-sponsored professional association under the aegis of the courts to which all practicing lawyers were required to maintain membership;<sup>61</sup> second, intensified disciplinary enforce-

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57. G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884).

58. *Id.* at 73-74.

59. *Id.* at 78-80.

60. See C. WOLFRAM, *supra* note 10, at 55. For the use of the Canons as evidence of legal standards, see *infra* note 77.

61. See Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1. But cf. *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990) (invalidating use of compulsory dues for bar association's political purposes).

ment, including the sanctions of disbarment and suspension, which only the courts could impose;<sup>62</sup> and third, transformation of the norms of professional conduct into binding legal rules. At the same time the courts themselves, particularly the Supreme Court, increasingly intervened at the behest of dissident lawyers and others to reshape the profession's governing rules.

The transformation of the norms of professional conduct was principally effected by the ABA's Code of Professional Responsibility in 1970. The Code contained three tiers of norms. The first consisted of nine pithy pronouncements called "Canons," the second of commentaries, designated as "Ethical Considerations," which spoke to lawyers in the profession's traditional ethical rhetoric. Both the Canons and the Ethical Considerations were intended to be admonitory.

However, the Code's third tier of norms consisted of black-letter law known as Disciplinary Rules ("DR's"). Violation of the Rules was to result not merely in fraternal disapprobation but in disciplinary adjudication, with court-imposed penalties. Thus, whereas the Canons and the Ethical Considerations represented fraternal understandings that memorialized a shared group discourse, the DR's functioned as a statute defining the legal contours of a vocation whose practitioners were connected primarily by having been licensed to practice law.

The Code was rapidly adopted in almost every state and was recognized by the federal courts in the exercise of their powers over lawyers appearing in federal litigation.<sup>63</sup> Nevertheless, only seven years after the Code's promulgation the ABA undertook a revision, eventually producing the 1983 Model Rules of Professional Conduct. The Rules replaced the Code's three-tiered structure of Canons, Ethical Considerations, and Disciplinary Rules with a two-level structure of Rules and Comments. Unlike the Ethical Considerations in the Code, the Comments were not coexistent norms going above and beyond, or standing beside, the Rules; they simply provided background, rationale, and explanation for the Rules.

In retrospect, it is clear that the crucial step in the "legalization" process occurred in the change from the 1908 Canons to the 1970 Code, rather than from the Code to the 1983 Rules. It was the Code that first embraced legally binding norms in the form of the Disciplinary Rules, albeit also retaining (in the Ethical Considerations) the fraternal voice of the Canons. The Code's Disciplinary Rules formed the baseline of the 1983 Rules; indeed, many of the DR's were carried over intact into the Rules.

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62. See ABA Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (Clark Report) (Prelim. Draft 1970).

63. See C. WOLFRAM, *supra* note 10, at 56-57; *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 ANN. REP. ABA 268 (1972) (reporting adoption of Code in 40 states and substantial progress towards adoption in seven more so that "in only three states . . . has no official approval of the Code as yet been given").

This legalization of the profession's norms evoked controversy within the legal profession, and to some extent outside it as well.<sup>64</sup> Ironically, however, the greatest political controversy arose during the revision of the Code into the Rules, not during the much greater change from Canons to Code. Indeed, the 1970 Code evoked little debate or resistance. It was published by the drafting committee in 1968, endorsed by the ABA in 1969, promulgated in 1970, and by 1974 had been adopted by almost every state.<sup>65</sup> In contrast, the Rules of Professional Conduct were published in Discussion Draft form in 1980, substantially revised into a 1981 "Proposed Final Draft," further revised before submission to the ABA House of Delegates in 1982, debated at length at the ABA's annual meeting in 1982 and midyear meeting in 1983, revised yet again in the spring of 1983, and finally adopted in August of that year.<sup>66</sup> Not only was the drafting process controversial throughout, the reception of the Rules by the states was as slow and widely resisted as the reception accorded the Code had been rapid and widespread. Many states made significant revisions, usually in the direction of retaining Code formulations; others essentially rejected the rules, adopting only selected provisions as amendments to their versions of the Code.<sup>67</sup>

This apparent paradox can be resolved by considering the relationship of the profession's regulations to the authority of the state. The 1908 Canons asserted the profession's autonomy from government; the Code's Canons and Ethical Considerations perpetuated that claim, but the Rules seemed to abandon it. This transformation was reflected in the different drafting processes which produced the Code and the Rules.

### B. *Change in Voice*

The committee that drafted the 1970 Code was designed to be acceptable to the profession. Its chairman (in those days it was "chairman," not "chair") was Edward L. Wright of Little Rock, Arkansas, a long-time active member of the ABA, a leader of the American College of Trial Lawyers, former Chairman of the ABA House of Delegates, and a prospective President of the ABA itself. Mr. Wright was outwardly conventional—indeed formal—in dress, conversation, and deportment, and his fellow committee members were mostly

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64. See, e.g., Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 678 (1989) (describing adoption of Rules as "the most sustained and democratic debate about professional ethics in the history of the American bar").

65. Armstrong, *Codes of Professional Responsibility*, in PROFESSIONAL RESPONSIBILITY, A GUIDE FOR ATTORNEYS 1, 4 (1978); Subin, *The Lawyer as Superego: Disclosures of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1093 (1988) (summarizing history of drafting and acceptance of Code).

66. See generally Schneyer, *supra* note 64.

67. See Law. Man. on Prof. Conduct (ABA/BNA) 01:11-01:40 (detailing substantial revisions in Model Rules made by 39 states prior to adopting Rules).

senior practitioners of long standing in the organized bar.<sup>68</sup> This conservative group foreclosed controversy over its deliberations by conducting them in closed meetings. No outsiders were invited to participate or to review drafts; no interim drafts were published or circulated; no hearings were held.<sup>69</sup>

The drafting process for the Rules of Professional Conduct stood in complete contrast. First, the committee's composition was untraditional. Its chair was Robert Kutak, a reformer passionate both in conviction and style, who came to be regarded by the bar as a dangerous radical. The panel included a large proportion of legal academics and relatively few practicing lawyers; the member from the South was Black; and the judicial member was Judge Marvin Frankel of New York, author of a professional ethics decision that had rocked a Wall Street practice and an article disturbingly critical of the adversary system.<sup>70</sup>

Second, the Kutak Commission's drafting process was quasi-legislative. Interim drafts were made available to interested observers; a preliminary draft of the Rules was published in 1980 and widely disseminated; and the committee's final draft, published in 1981, elicited two counterdrafts.<sup>71</sup> An unprecedented volume of law review commentary accompanied and contributed to the deliberations.<sup>72</sup> In short, the process mirrored that of public lawmaking.

The Rules also involved a change in normative rhetoric. The Code had retained the familiar term "Canons" from the 1908 version and used it as a vehicle for expansive and strongly self-justifying language. For example, Canon 2 of the Code stated: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available";<sup>73</sup> Canon 7 stated: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Similarly, many of the Code's Ethical Considerations echoed the Canons. For example, Canon 6 of the 1908 Canons provided: "It is the duty of a lawyer at the time

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68. For example, the judicial member of the panel was Charles Whitaker, a retired Justice of the Supreme Court. For a discussion of the committee's membership, see Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 2 (1970) (giving names, occupations, and additional background of committee members).

69. *Id.* at 6-7.

70. Schneyer, *supra* note 64, at 693-95 (detailing composition of committee). For Judge Frankel's critical view of the relationship between lawyering and truth-finding, see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615-16 (S.D.N.Y. 1977) (in dicta, arguing that F.R.E. Rule 612, rendering discoverable written materials used to refresh the memory of witnesses, was not intended to leave the attorney work product privilege untouched but, in appropriate circumstances, may be used to gain access to files made in preparation for trial); Frankel, *supra* note 25, at 1036 (emphasizing the truth-finding function of trials and arguing that "the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth"). For background to *Berkey Photo* and Judge Frankel's views, see Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188, 190, 192 (recounting the scandal set off by the revelation at trial that Kodak's lawyers had withheld or declared nonexistent materials which they had been ordered to produce).

71. Schneyer, *supra* note 64, at 678.

72. *Id.*

73. Never mind that the Disciplinary Rules subsumed under this heading consisted primarily of restrictions on advertising and solicitation, i.e., practices whereby a lawyer might broaden the availability of his service.



of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel."<sup>74</sup> In much the same voice EC 5-15 of the Code provided:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.<sup>75</sup>

In contrast, the Rules of Professional Conduct abandoned the term "Canons" and foreswore the discourses in the Ethical Considerations. Instead, the Rules were rendered in statutory language whose accompanying Comments were merely "intended as guide to interpretation, but the text of each Rule is authoritative."<sup>76</sup> The Rules of Professional Conduct thus implied that the normative definition of the profession could be expressed only using the medium of legally binding rules and hence that "binding ethics" would be an oxymoron.<sup>77</sup> Correlatively, the Rules affirmed that the standards of professional conduct were legal obligations and not merely professional ones. This contradicted the traditional notion that lawyers, as officers of the court, had a kind of immunity from the law.<sup>78</sup>

Altogether, the profession's reaction to the Rules reflected the belated realization that its normative foundations no longer represented the shared

74. ABA CANONS OF PROFESSIONAL ETHICS Canon 6 (1936).

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15 (1986).

76. MODEL RULES OF PROFESSIONAL CONDUCT Scope Note, at 3, para. 9 (1983). Moreover, the Rules rejected the very notion that there could be a *code* of "ethics" promulgated as legal authority. As stated in the Scope Note: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer. . . . The Rules simply provide a framework for the ethical practice of law." *Id.* para. 2.

77. Because the 1908 Canons were something different from legal rules, their status as a basis for disciplinary action was uncertain. They were used primarily as guides to the ethical duties of lawyers and as standards of professionalism. *See Hodge v. Huff*, 140 F.2d 686, 687 & n.1 (D.C. Cir. 1944) (counsel commended for meeting "best efforts" standard for representing indigent prisoners); *United States v. Perlstein*, 120 F.2d 276, 285 & n.3 (3d Cir. 1941) (Clark, J., dissenting) (attorneys convicted of impeding justice also described as having violated "the canons of a learned and honorable profession"); *Merrick v. American Sec. & Trust Co.*, 107 F.2d 271, 276 & n.17 (D.C. Cir. 1939) (Canon 35 cited for proposition that lay intermediary may not intervene between client and lawyer); *Northern Trust Co. v. Edenborn*, 98 F.2d 657, 660-62 (5th Cir. 1938) (attorneys found not to have violated 1908 Canons and that conduct otherwise did not support charge of fraud); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930) (cites 1908 Canons in upholding attorney's fees granted below as not excessive); *United States ex rel. Randolph v. Ross*, 298 F. 64, 66 (6th Cir. 1924) (1908 Canons cited in support of holding that an attorney representing an indigent client on contingent fee basis does not behave unethically where he refuses to comply with rule of court requiring him to give security for his client's costs of suit, though this results in dismissal of client's case). *But see Bates v. State Bar*, 433 U.S. 350, 362 n.15 (1977) (noting that under 1919 Ariz. Sess. Laws 158, the 1908 Canons are incorporated by reference into Arizona's statutory law).

78. *See G. HAZARD & S. KONIAK, THE LAW AND ETHICS OF LAWYERING* 35-53 (1990).

understandings of a cohesive group.<sup>79</sup> More fundamentally, the profession's official statement of ethical norms no longer expressed its heroic narrative. In the vocabulary of sociologist Max Weber, the Rules represented a transformation of the profession from a "traditional" institution—one in which authority derives from "the sanctity of age-old rules"—to a "bureaucratic" institution—one regulated by a "system of abstract rules which have . . . been intentionally established" for "expediency, value-rationality, or both."<sup>80</sup> As a member of a traditional institution, a lawyer would first think: "Doing *x* is unprofessional," and perhaps on second thought wonder whether *x* was barred by the Canons. As a member of an institution whose character is defined by law, the lawyer's first thought is more likely to be: "Does Rule Y prohibit/require doing *x*?"

### C. Public Intervention in the Profession's Governance

Another "legalizing" force consisted of interventions in the bar's self-governance initiated by courts and legislators. The reform of disciplinary enforcement has been previously mentioned.<sup>81</sup> Although the movement for this reform came partly from the bar's leadership, it also reflected the Supreme Court's imposition of due process standards on the bar's disciplinary procedures. For example, the license to practice law was characterized by the Court as a right, either of property or person, the deprivation of which required minimal procedural regularities.<sup>82</sup> Disciplinary matters traditionally were considered by grievance committees composed of local practitioners who dealt through informal hearings with the accused lawyers as people whom they knew personally or through mutual acquaintances; reform of disciplinary enforcement turned these hearings into formal trial procedures before what were becoming administrative law tribunals.

Another sector of traditional responsibility—the bar's obligation to represent indigents—was substantially replaced by publicly funded legal aid. Supreme Court decisions held that all indigent defendants in serious criminal cases must be provided with a lawyer, and Congress mandated that indigents were entitled to some legal services in civil matters as well.<sup>83</sup> As a practical matter these

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79. To be sure, some passages in the old Canons could be read as a legal code, and interwoven with the Canons a body of common law governing legal practice had evolved. *See, e.g.*, E. THORNTON, A TREATISE ON ATTORNEYS AT LAW (1914), a two-volume work of the classic style which cites hundreds of cases. *See supra* note 77 for federal cases citing Canons for evidence of standards of ethical conduct.

80. 1 M. WEBER, *ECONOMY AND SOCIETY* 217, 226 (G. Roth & C. Wittich eds. 1968).

81. *See supra* note 62.

82. *Compare Spevak v. Klein*, 385 U.S. 511 (1967) (lawyer may not be disbarred for refusing in a disciplinary hearing to make responses that would tend to incriminate him), *overruling Cohen v. Hurley*, 366 U.S. 117 (1961) *with In re Ruffalo*, 390 U.S. 544 (1968) (lawyer may not be disbarred without procedural due process, including fair notice of charge against him).

83. *Gideon v. Wainwright*, 372 U.S. 335 (1963); Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552; Crampton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981) (explores debate over providing legal services to the poor in civil cases).

changes required that legal services in urban communities be provided by lawyers working for pay, thereby displacing the bar's traditional system of voluntary representation of the poor.<sup>84</sup>

In addition, the Supreme Court invalidated the bar's endeavors to control competition among lawyers through minimum fee schedules,<sup>85</sup> and to restrict advertising and solicitation.<sup>86</sup> The legitimization of advertising changed the image of lawyers from professionals who deplored self-laudation into that of aggressive self-promoters.<sup>87</sup> The Court also limited the bar's control on admission to practice<sup>88</sup> and lowered the barriers to admission that could be imposed on aliens and nonresidents.<sup>89</sup>

Public law intruded upon the profession's tradition of autonomy in other respects as well. In an area close to the center of traditional practice, the SEC challenged the bar's authority to define a lawyer's responsibilities in securities transactions.<sup>90</sup> The Treasury Department raised a similar challenge to traditional rules for tax practice.<sup>91</sup> Other judicial decisions imposed legal controls on

84. Hazard, *After Professional Virtue*, 1989 SUP. CT. REV. 213, 220 ("[Aid] was to be a matter not of the bar's professional responsibility but of entitlement under public law. However, the scope of potential entitlement was to be defined by budgetary constraints, not in terms of legally specified categories.").

85. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule, as published by the County Bar Association and enforced by Virginia Bar, violated § 1 of Sherman Act).

86. Shapiro v. Kentucky Bar Ass'n, 486 U.S. 466 (1983) (1st and 14th Amendments bar state from categorically prohibiting lawyers from soliciting business by sending truthful and nondeceptive letters to potential clients known to face particular legal problems).

87. Compare the majority opinion in *Shapiro* with the following passage from the dissent of Justice O'Connor in that case:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. . . . [The] special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably yield in a political system like ours.

486 U.S. at 488-89.

88. *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (14th Amendment protects against arbitrary state action); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (any qualifications promulgated by state regarding admission to bar must bear rational connection to applicant's fitness or capacity to practice law).

89. See *Supreme Court v. Friedman*, 487 U.S. 59 (1988); *Supreme Court v. Piper*, 470 U.S. 274 (1985) (residency requirements); *In re Griffiths*, 413 U.S. 717 (1973) (requirement of citizenship held invalid). The decisions concerning residency requirements had been foreshadowed by state court decisions a decade earlier. See, e.g., *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (statute prohibiting admission to Bar of State absent proof of a cheap residence for six months violates privileges and immunities clause of federal Constitution).

90. *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682, 712 (D.D.C. 1978) (attorney guilty of aiding and abetting securities violation where he does not prevent violation of securities laws); *In re Carter and Johnson*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,145 (Feb. 28, 1981) (attorneys held not to have aided and abetted securities violation because clients had been warned to tell truth); see also *Krane, The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50 (1981) (arguing that the chilling effect of Rule 2(e) violates client's right to counsel); *Subin, supra* note 65, at 1142-43 (regarding conflict between attorney's self-defense and incrimination of client).

91. Compare *Durst, The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027 (1987) with ABA Comm. on Ethics and Professional Responsibility, Formal Op. 352 (1985) and *Paul, The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377 (1950).

the relationship of corporate counsel to corporate officers and boards of directors.<sup>92</sup> And in yet another area central to traditional practice, state courts injected exposure to malpractice liability into the relationship between insurer, insured, and insurance defense counsel.<sup>93</sup>

#### D. *Belated Realization of Change*

By the late 1970's the bar was more or less aware of this increasing legalization of the profession's norms, but there was no general appreciation of its cumulative effect. The Code of Professional Responsibility had skirted many key ethical problems. On the sensitive subject of client perjury, for example, the law pronounced by courts made it clear that a lawyer could not offer testimony known to be perjured, even the testimony of a client in a criminal case.<sup>94</sup> The Code affirmed this principle as a truism in its Ethical Considerations, but its Disciplinary Rules could be read as sidestepping the issue.<sup>95</sup> Another sensitive subject was the lawyer's responsibility when confronted with a client engaged in fraud. The case law clearly prohibited a lawyer from assisting a client in a crime or in fraud,<sup>96</sup> but the Code submerged this problem in ambiguity.<sup>97</sup>

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92. See, e.g., *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (where several pending suits involved struggle in union, disqualification of regular union counsel in derivative action and its continued representation of individuals in other suits, best serves the interests of the union and the Labor Management Reporting and Disclosure Act); *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (availability of attorney-client privilege for corporate client is subject to right of stockholders to show cause why it should not be invoked in a particular instance).

93. See, e.g., *Rogers v. Robson, Masters, Ryan, Brumany & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (Ill. Ct. App. 1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980) (attorney who represented both insurer and insured in medical malpractice action against insured, had duty to make full disclosure to insured in regard to settling of suit regardless of insurer's authority to settle without insured's consent).

94. See *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967) (defendant's alleged statement to his attorney that he had committed perjury was good cause for attorney to withdraw from case, and attorney would have been subject to discipline had he continued in defense without making a report to the court); *Dodd v. Florida Bar*, 118 So. 2d 17 (Fla. 1960) (advising several persons, including clients, to give false testimony warrants disbarment).

95. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1986) ("The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence.") (citation omitted) with *id.* DR 7-102(B)(1) ("A lawyer who receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud upon a . . . tribunal shall . . . reveal the fraud . . . except when the information is protected as a privileged communication.") (citation omitted). See, e.g., *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

96. See *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964) (attorney had culpable state of mind sufficient to sustain conviction on charge of conspiracy to sell unregistered securities). See generally Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981).

97. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1986):

A lawyer who receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud upon a person . . . shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person except when the information is protected as a privileged communication.

See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (liberally interpreting the protection given in DR 7-102(B)(1) to "confidential information received in connection with

These discrepancies between the norms of professionalism as understood by the bar and the law of lawyering as enforced by courts and legislatures came into full view only with the revision undertaken in the Rules of Professional Conduct. The Kutak Commission sought to take honest account of the extent to which public law had come to define the profession's duties and responsibilities.

For example, on the issue of advertising and solicitation, the Kutak draft recognized that certain forms of advertising had become protected by the Constitution, however grievously such self-promotion might violate professional tradition.<sup>98</sup> Likewise, recognizing that an advocate could be held criminally and civilly liable if involved in a client's fraud, the Kutak draft tried to qualify the rules about client confidences to protect an innocent lawyer enmeshed in such a scheme. This violated the fraternal tradition that client confidences were sacrosanct.<sup>99</sup> In addition, the Kutak draft directly addressed the problem of client perjury, adopting the premise that knowingly presenting perjured testimony is fraud upon the court. This also contravened the professional tradition according to which a lawyer must maintain unqualified loyalty to a client.<sup>100</sup>

When the Code of Professional Responsibility had addressed controversial issues, it invariably resolved them in favor of fraternal solidarity. In defining competence, for example, DR 6-101(A)(1) provided that a lawyer shall not "handle a legal matter which he knows or should know that he is not competent to handle . . . ."<sup>101</sup> This standard was lower than the established rule of civil liability for malpractice, under which an attorney must "exercise the skill, apply the knowledge, and exert the diligence . . . [of] a lawyer of ordinary competence and diligence."<sup>102</sup> Again, the Code maintained in full form the traditional prohibitions against unauthorized practice of law and third-party "interference" with the lawyer-client relationship,<sup>103</sup> although it said nothing that threatened the arrangements whereby corporations, trade associations, and insurance companies employed staff legal services.

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the professional relationship").

98. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment at 123 (Discussion Draft Jan. 30, 1980) (lawyer advertising traditionally prohibited by rules of professional ethics, but now substantially protected by Constitution).

99. See Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984) (discussing ABA's resolution regarding client fraud).

100. Compare M. FREEDMAN, *supra* note 48, at 40-41 (asserting that "the criminal defense attorney, however unwillingly . . . has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant") with *Nix v. Whiteside*, 475 U.S. 157 (1986) (Sixth Amendment right of criminal defendant is not violated when attorney refuses to cooperate with defendant in presenting perjured testimony at trial).

101. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1986).

102. C. WOLFRAM, *supra* note 10, at 210.

103. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 to 3-9, DR 3-101 to 3-103 (1986) (lawyers should assist in preventing unauthorized practice of law); *id.* EC 5-21 to 5-24, DR 5-107 (lawyers should resist third party interference). See generally Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

When these issues were candidly addressed in the Rules of Professional Conduct, the bar was inclined to blame the draftsmen for acknowledging legal realities, and reacted with shock and outrage.<sup>104</sup>

Over the same period radical changes occurring in the profession weakened the traditional bar's conception of itself, which in turn enhanced the bar's difficulties in dealing with the fact that its norms were becoming public law. Between 1960 and 1983—the year the Rules of Professional Conduct were adopted—the number of practicing lawyers and judges increased from about 205,000 to about 651,000, more than tripling over the span of a single professional generation.<sup>105</sup> The increased economic significance of the legal profession in the marketplace was even more dramatic; income from legal services rose from about \$2.7 billion in 1960 to \$32.5 billion in 1983.<sup>106</sup> Law firms proliferated in number and even more visibly in size.<sup>107</sup> Recruitment into the profession was affected by programs reaching out to racial minorities and women, whose assimilation into law practice became both a norm of public policy and a legal duty.<sup>108</sup> Legal process itself burgeoned as government regulation and private legal counter-regulatory measures pervaded important areas of social life, including the employment relationship, consumer transactions, the environment, health and welfare and retirement benefits, international commerce, and the war against drugs.<sup>109</sup> The number and complexity of cases in the courts relentlessly increased,<sup>110</sup> as did the number of judges and their diversity in terms of gender, race, and political inclination.<sup>111</sup> The American

104. But see Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739 (1981) (Model Rules of Professional Responsibility are radical because of their honesty about what law already is, and their willingness to accept uncertainty in law).

105. According to the Bureau of the Census, there were approximately 205,000 employed lawyers and judges in 1960 and 651,000 in 1983. STATISTICAL ABSTRACT OF THE UNITED STATES 230 (86th ed. 1965); *id.* at 402 (105th ed. 1985).

106. THE WORLD ALMANAC & BOOK OF FACTS 152 (1985) (citing figures from the U.S. Commerce Dept.).

107. See, e.g., Adams, *The Legal Profession: A Critical Evaluation*, 74 JUDICATURE 77, 79 (1990) ("In 1975, there were only four firms with over 200 lawyers in the United States . . . a recent survey reported well over 150 firms with more than 200 lawyers . . ."); Fitzpatrick, *Legal Future Shock: The Role of Large Firms by the End of the Century*, 64 IND. L.J. 461, 462 (1989) (more than 100 law firms exceed \$45 million per year in revenue).

108. See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) (plaintiff states cause of action under Title VII in her complaint alleging gender bias in law firm's decision to withhold partnership status); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988) (formal barriers to entry for women have fallen, but informal obstacles to advancement remain).

109. Adams, *supra* note 107, at 78 (noting the effects upon the legal profession of "the rise of the administrative state" and development of new forms of legal action).

110. See, e.g., *id.* at 80 ("[T]he growing percentage of complex multiparty actions create a burden that courts are not institutionally equipped to handle."); Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 686 (1988) (arguing that increasing complexity of legal matters has been a cause of change within the legal profession).

111. See, e.g., Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 351 (1981) ("Carter chose an unprecedented number of women, blacks, and those of Hispanic origin to the second highest bench in the nation."); Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 204 (Dec. 1989-Jan. 1990) ("[W]omen judges, acting collectively . . . are having an impact

Bar Association itself underwent internal transformation.<sup>112</sup> By the 1980's, the bar had become a "community" of strangers.

#### IV. CHANGING VIEWS OF THE PROFESSION'S ROLE

Concurrent with the "legalization" of the profession's governance have been changes in the orientation of the profession towards the centers of authority with which law practice is principally interlinked—the courts on the one hand, those in control of business enterprise on the other. The relationship between the profession and the courts became more distant and less politically sympathetic. The widely celebrated judicial activism epitomized by the Supreme Court's decision in *Brown v. Board of Education*<sup>113</sup> struck the traditional bar as lawless and profoundly imprudent. The Warren Court, the paradigm of the activist judiciary, initiated change in the law at a pace and along lines that were divergent from, and in many instances hostile to, the traditional bar's conception of law.<sup>114</sup> The Court's innovations weakened the bar's identification of itself as an auxiliary of the judicial system—as "officers of the court," in the traditional phrase.

At approximately the same time a deterioration began in the generally perceived legitimacy of the bar's primary practice, the representation of business enterprise. Large corporations have always been viewed with repugnance by the American public at large.<sup>115</sup> Law practice in the service of corporate enterprise was viewed with ambivalence at best (even by some attorneys in corporate practice)<sup>116</sup> and with open scorn at worst. In the 1960's and early

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far beyond what might be expected from their small numbers (5-10 percent of the American bench) in illuminating and correcting problems of gender bias within the court system." While it is clear that judicial appointments in the Reagan era did not match the diversity of those of the Carter administration, particularly in the area of Black appointments, the Reagan appointments did show greater diversity in most ways than pre-Carter appointments. See Goldman, *Reagan's Judicial Legacy*, 72 JUDICATURE 318 *passim* (1989); see also Walker & Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 597, 614 (1985) (finding no substantial male/female or black/white differences between judges in the policies and processes of the judiciary). But see Wald, *Will We Ever Rid the Legal Profession of "The Ugly Residue of Gender Discrimination"?*, 16 HUM. RTS. 40 (1989).

112. See generally Bodine, Hengstler & Gonser, *It's Time for a Change: An Interview with Tom Gonser*, 73 A.B.A. J. 152 (1987).

113. 349 U.S. 294 (1954).

114. See, e.g., A. BICKEL, *POLITICS AND THE WARREN COURT* 138 (1965); C. BLACK, *The Lawfulness of the Segregation Decisions*, in *THE OCCASIONS OF JUSTICE* 129, 141 n.25 (1963).

115. See, e.g., Mann, *Affiliate Relationships: Strategic Imperative or Regulatory Impediment?*, 125 PUB. UTIL. FORT., June 13, 1990, at 28 (noting the "suspicion and fear of big business" in the United States and quoting Woodrow Wilson's 1912, anti-big-business nomination speech: "big business is not dangerous because it is big, but because its bigness is an unwholesome inflation created by privilege and exceptions which it ought not enjoy").

116. See, e.g., BRANDEIS, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 321 (1914) ("We hear much of the 'corporation lawyer' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people."), quoted in Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 744 n.17 (1988); Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6-7 (1934) ("The rise of big business has produced an inevitable specialization of the Bar . . . . At its best the changed system has

1970's, however, the negative attitude became more virulent and was publicly documented in specific cases.<sup>117</sup>

The deterioration of professional legitimacy was epitomized in the Watergate scandal.<sup>118</sup> The many sordid events of Watergate included the Government's illegal search of Daniel Ellsberg's household and seizure of his papers, in blatant violation of the bar's due process ideal. The search for proof that Ellsberg had leaked the Pentagon Papers was the very kind of government oppression that had been condemned in *Boyd v. United States* as "the invasion of [the private citizen's] indefeasible right of personal security, personal liberty and private property . . . ."<sup>119</sup>

This violation of Ellsberg's personal liberty and private property was then compounded by a coverup, made possible by lawyers who presented testimony that evidently was known to be false.<sup>120</sup> This constituted a breach of the basic article of professional faith between bar and bench—the norm of candor to the court on which the legitimacy of the advocate's role depends. Richard Nixon, the man responsible for these violations, was a former Wall Street lawyer conspicuous for his identification with business interests. Few practicing lawyers, however, seemed to think the Ellsberg matter of serious concern.

Thus, over the twenty year period from 1954, when *Brown v. Board of Education*<sup>121</sup> was decided, to 1974, when Nixon resigned as President, the

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brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations.").

117. Notorious instances included the surveillance of Ralph Nader by the general counsel for General Motors, Wessel, *Adversary Science and the Adversary Scientist: Threats to Responsible Dispute Resolution*, 28 JURIMETRICS J. 379 (1988) ("The public . . . made its decision condemning the Corvair because it concluded that General Motors' decision to investigate Nader for possible homosexuality, alcoholism, anti-Semitism, and the like meant that General Motors knew something serious was wrong . . . ."); and Love Canal, where an industrial toxic site was allegedly passed from corporate ownership by artful conveyancing, Novitski, *Ongoing SEC Disclosure Requirements*, 342 PLI REAL 175 (1989) (describing Hooker Chemical's conveyance of toxic landfill sites to the Board of Education, City of Niagara Falls, for one dollar and a release from liability).

118. See, e.g., Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 244 (1985) (characterizing Watergate as a national scandal in which members of the bar appeared as lead villains); Subin, *supra* note 65, at 1093 (arguing that Watergate inspired a comprehensive review of the Model Code); Note, *Estate of Younger: Violation of an Ethical Consideration Equals a Legal Presumption*, 45 U. PITT. L. REV. 719, 738 n.121 (1984) ("Watergate was a disaster for the reputation of America's lawyers."). But see Frug, *Introduction: The Proposed Revisions of the Code of Professional Responsibility: Solving the Crisis of Professionalism, or Legitimizing the Status Quo?*, 26 VILL. L. REV. 1121, 1122, 1124 (1980-81) (arguing that "the profession can trace the development of each of its formal codes to a crisis of the social order and the complicity of lawyers in that crisis," but contending that crisis motivating reform of Code "is not limited to a single question of social reform" but is related instead to a diffuse sense of lawyers' "amorality").

119. 116 U.S. 616, 630 (1885).

120. See, e.g., Blodgett, *Windows into the Legal Past*, 71 A.B.A. J. 44, 48 (1985) ("[F]ormer Attorney General John N. Mitchell and former Nixon administration officials John D. Ehrlichman and H.R. Haldeman . . . were found guilty of obstructing justice, conspiracy and perjury . . . .").

121. 347 U.S. 483 (1954).



legal profession's two fundamental linkages—to the courts and to business—were weakened in different but very serious ways.<sup>122</sup>

In a much less noticeable fashion, changes in the relationship between the legal profession, the courts, and business enterprise were reflected in the profession's ethical standards. The differences can be seen by comparing the Canons of yesteryear and the Rules of today. One difference concerns the use of the courts—the invocation by private parties of the state's coercive judicial power. The old Canons insistently admonished against initiation of litigation. In contrast, the new Rules take an essentially neutral position on the uses of litigation. The other significant difference concerns the profession's duty of deference to the courts. The Canons preached professional fealty toward the judiciary as an institution, while the Rules take a neutral position on this issue.

### A. *The Uses of Litigation*

The Canons' hostility toward litigation emerged in several provisions:

#### *Canon 8, Advising Upon the Merits of a Client's Cause:*

A lawyer . . . is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation . . . . Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.<sup>123</sup>

#### *Canon 28, Stirring Up Litigation, Directly or Through Agents:*

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so . . . . It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients . . . .<sup>124</sup>

#### *Canon 30, Justifiable and Unjustifiable Litigation:*

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong . . . .<sup>125</sup>

#### *Canon 31, Responsibility for Litigation:*

Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants . . . .<sup>126</sup>

#### *Canon 32, The Lawyer's Duty in the Last Analysis:*

[A lawyer] advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to

122. Interestingly, neither the Warren Court nor Watergate is mentioned in the American Bar Association's most recent endeavor at ethical self-reassessment. See generally *ABA Blueprint for Professionalism*, *supra* note 2, at 243.

123. ABA CANONS OF PROFESSIONAL ETHICS Canon 8 (1936).

124. *Id.* Canon 28.

125. *Id.* Canon 30.

126. *Id.* Canon 31.

impress upon the client . . . exact compliance with the strictest principles of moral law . . . .<sup>127</sup>

In contrast, the Rules of Professional Conduct address the litigation issue by deferring to law generated outside the bar. The Rules incorporate by inference the legal standards of civil and criminal procedure; they thus impose no independent professional restraint—no fraternal inhibition going beyond the restraints imposed by the law itself—upon a lawyer's conduct of litigation.

Several illustrations will suffice.

Rule 3.1 deals with the threshold of legal and factual plausibility that a lawyer must meet in bringing or defending a case. The formula in that rule is: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law . . . ."<sup>128</sup>

The "good faith argument" formulation is the same as that in Rule 11 of the Federal Rules of Civil Procedure, and the "nonfrivolous" standard is, if anything, less exacting than that imposed by Rule 11.<sup>129</sup>

Rule 3.2, which deals with expediting litigation, imposes a duty that goes little, if any, further than the duties imposed by the law of civil procedure.<sup>130</sup>

Rule 3.3, dealing with candor to the court, including the problem of client perjury, also largely echoes existing procedural law.<sup>131</sup>

Rule 3.4, dealing with fair access to evidence, directly incorporates procedural law external to the ethics rules.<sup>132</sup>

Rule 3.6, dealing with pretrial publicity, attempts simply to restate decisional law by defining the balance between speech interests protected by the First Amendment and fair trial interests protected by the Fifth Amendment.<sup>133</sup>

Rule 3.8, governing the special responsibilities of a prosecutor, implicitly incorporates by reference prevailing constitutional and procedural requirements.<sup>134</sup>

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127. *Id.* Canon 32.

128. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

129. *See* FED. R. CIV. P. 11.

130. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983) (a lawyer should make reasonable efforts to expedite litigation consistent with the interests of the client) *with* FED. R. CIV. P. 16(f), 37E (providing sanctions for attorney's failure to comply with a scheduling or pretrial order).

131. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) *with* *Nix v. Whiteside*, 475 U.S. 157 (1986) (accepted norms require that an attorney disclose his client's perjury and frauds upon the court).

132. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983).

133. *Id.* Rule 3.6; *see also* ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 240-48 (1984).

134. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983).

Thus, in contrast to the repeated admonitions in the old Canons against "stirring up litigation,"<sup>135</sup> the Rules contain no such warnings, except those implicit in the requirement that litigation be conducted according to law.

### B. *Affiliation of the Bar with the Courts*

The Canons' message concerning the relationship between the bar and the judiciary was as positive as its admonitions about litigation were negative: lawyers must support and sustain the courts.

The Preamble to the Canons begins with a strong statement on the importance of maintaining the integrity of the justice system:

In America, where the stability of Courts and of all departments of government rests upon approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration . . . .<sup>136</sup>

The first three Canons speak to the same subject:

*Canon 1, The Duty of the Lawyer to the Courts:*

It is the duty of the lawyer to maintain towards the Courts a respectful attitude . . . .<sup>137</sup>

*Canon 2, The Selection of Judges:*

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges . . . .<sup>138</sup>

*Canon 3, Attempts to Exert Personal Influence on the Court:*

A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor . . . .<sup>139</sup>

In contrast, the Rules of Professional Conduct are virtually silent on the subject of attorney-judge relations. The Preamble to the Rules outlines a carefully measured concept of the lawyer's interaction with the courts:

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135. See *supra* text accompanying notes 105-08.

136. ABA CANONS OF PROFESSIONAL ETHICS Preamble (1936).

137. *Id.* Canon 1.

138. *Id.* Canon 2.

139. *Id.* Canon 3; see also *id.* Canon 16 (Restraining Clients from Improprieties: "A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards the Courts, judicial officers, jurors, witnesses and suitors . . . .").

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice . . . .

As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system . . . .

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.<sup>140</sup>

The Rules themselves contain no provisions that deal with maintaining public confidence in the judiciary or the administration of justice. Their closest approach is in Rule 8.2(a), which states:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.<sup>141</sup>

The Comment to Rule 8.2 goes on to say: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."<sup>142</sup> Thus, the legal profession has consigned the propriety of litigation tactics to the law of procedure and no longer defines itself as committed to the political support of the judiciary.

Such a shift was inevitable once the profession's ethical norms were transformed from fraternal admonitions into legal rules. It is one thing fraternally to warn a lawyer against filing an action unless no other recourse can be had; it is quite another to make this the legal standard for bringing suit.<sup>143</sup> Similarly, it is one thing to urge the bar to support the courts against popular suspicion or disaffection, but another to require that lawyers take political action to that effect.<sup>144</sup>

A deeper change is also evident here. The primary beneficiaries of the admonition against "stirring up litigation" were existing business and property interests. After all, as a practical matter it makes little financial sense to sue poor people, since the chances are remote of realizing a sizeable recovery against someone who has no money. Therefore, an admonition to avoid litigation

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140. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

141. *Id.* Rule 8.2(a).

142. *Id.* Rule 8.2 comment.

143. *Cf.* NAACP v. Button, 371 U.S. 415 (1963) (state may not constitutionally prohibit lawyer's solicitation of legal business under its power to regulate profession).

144. *Cf.* Keller v. State Bar, 110 S. Ct. 2228 (1990) (state bar's use of compulsory dues to finance political and ideological activities was illegal when expenditures not reasonably incurred for purpose of regulating legal profession).

tion referred mainly to suits against business enterprises or people of means. The 1983 Rules effectively abrogated this protective relationship between the legal profession and business/property interests.

## V. A POLITICAL THEORY OF THE LEGAL PROFESSION'S ROLE

This raises the general question of whether a substantial community of political interest still exists between the bar and the judiciary. A century ago, lawyers were predominantly engaged in the representation of business and property interests, interests with which they were politically sympathetic. Today's lawyers are still predominantly engaged in such representation, and generally have corresponding political sympathies. But modern courts, at least from the 1960's through the mid-1980's, have not been as congenial to those interests. The change in the courts' orientation becomes quite clear if we compare the general outlook of the Supreme Court under Chief Justice White in 1908, when the Canons were promulgated, with that of the Supreme Court under Chief Justices Warren and Burger, when the Code and the Rules were adopted. The courts simply do not make the same parallel they once did between the legal protection of life and liberty interests and the legal protection of property interests.<sup>145</sup> This implicit rejection of the lawyer's traditional role has called into question the profession's conception of its place in American society.

As I noted earlier,<sup>146</sup> the legal profession's traditional ideal viewed the lawyer as the protector of life, liberty, and property through due process. The profession has sought to define this function in procedural terms, without express commitment to questions of distributive or social justice. On this basis, the profession attempts to retain both neutrality and procedural legitimacy. Yet this characterization can be sustained only with difficulty. Legal practice primarily involves the protection of property, specifically business property. The profession's legitimacy in performing this function rests on the continual reaffirmation, under the rubric of due process, of the parity between property on the one hand and life and liberty on the other.

A purely procedural concept of the parity between due process protection of persons and due process protection of property can be sustained only by ignoring the economics of such protection. Due process essentially consists of taking pains with the facts and the law before imposing legal sanctions. Taking such pains requires time and effort that must be paid for.<sup>147</sup> When a person is threatened by legal sanctions, resources to pay for the necessary time and

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145. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 574-86 (2d ed. 1988) (decline of Supreme Court's adherence to *Lochner*-esque conception of contractual liberty resulted from both internal and external forces).

146. See *supra* text accompanying notes 26-36.

147. R. POSNER, *THE ECONOMICS OF JUSTICE* 4-5 (1981).

effort may or may not be available, depending on the individual's wealth, family and friendship ties, and the availability of publicly provided counsel.<sup>148</sup> When property is threatened by legal sanctions, however, a measure of resource—the property itself—is available by definition. In many cases it will be worth spending some of the property in order to preserve the rest. Furthermore, the availability of this resource must be taken into account in evaluating the strategy of opposing parties.<sup>149</sup> Other things being equal, more resistance can be expected in legal conflict against an opposing party with financial means than against a party without such means.

This asymmetry in the effect of due process protection of property and persons might be considered politically and morally obnoxious. But the preferred treatment of property through the legal process might be legitimate under certain conditions. For example, protection of property might be viewed as 1) essential to a stable and prosperous society and 2) continually threatened by majoritarian democratic politics. This would validate the legal profession's role as mediator between property and democracy.

#### A. *Tocqueville's Analysis*

Although such a conception of the function of lawyers may be unfashionable today, it accords very well with the history of the American legal profession. I draw here on the seminal work of Alexis de Tocqueville, whose account of American culture<sup>150</sup> demonstrates an appreciation of the relationship between American society and American politics at their most formative stage. My discussion is merely preliminary, projecting lines of thought which may be worth further exploration. Such an exploration might proceed in terms that are suggested by the special perspective which Tocqueville brought to the American scene.<sup>151</sup>

Tocqueville's analysis shows a clear-eyed awareness of social class and its relationship to politics. Although he regarded American devotion to the idea of equality as profound and pervasively shared,<sup>152</sup> he also thought the egalitarian ideal masked two fundamental realities with which it was incompatible. One

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148. Compare *Gideon v. Wainwright*, 372 U.S. 335 (1963) (due process requires public provision of legal representation for defendant in felony prosecution) with *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (due process does not require provision of legal representation of party in civil litigation to terminate parental rights).

149. See, e.g., Klein & Priest, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (presenting economic model of determinants of settlement and litigation).

150. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer & M. Lerner eds. 1966).

151. Tocqueville was a foreigner, and hence a cultural comparativist. Second, his perspective was that of a scion of the European Old Regime, giving him working knowledge of another long-established political system. Third, Tocqueville had an acute appreciation of micropolitics—the relationship between the political economy of everyday life and the architecture of society as a whole. This focus helps explain his interest in the relationship of legal process to political process and the role of the legal profession, including judges and lawyers.

152. A. DE TOCQUEVILLE, *supra* note 150, at 43-50.

was race;<sup>153</sup> the other was class.<sup>154</sup> The latter is directly related to Tocqueville's conception of the role of law and lawyers in America.

### 1. *Lawyers as Aristocrats*

It is well known that Tocqueville described the American legal profession as aristocratic.<sup>155</sup> However, little attention has been paid to what he meant by "aristocracy." A careful reading, with an eye to Tocqueville's own background, suggests that he meant to denote an elite political force that in his view was necessary to maintain stable, nontyrannical government, which in turn was essential to achieving a prosperous commonwealth. Tocqueville's point of departure is the proposition that the American polity contained two basic affinities or "parties":

America has had great parties; now they no longer exist . . . . When the War of Independence came to an end . . . the nation was divided between two opinions. Those opinions were as old as the world itself . . . . One party wanted to restrict popular power and the other to extend it indefinitely.<sup>156</sup>

According to Tocqueville, these two broad factions dominated the American political system:

[W]hen one comes to study carefully the secret instincts governing American factions, one easily finds out that most of them are more or less connected with one or other of the two great parties which have divided mankind since free societies came into existence . . . .

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153. E.g., "There are other things in America besides an immense and complete democracy," notably "three naturally distinct, one might almost say hostile, races . . . the white man . . . the Negro and the Indian." *Id.* at 291. Tocqueville's reflections on this subject show a sensitivity not widely shared in his time. See, e.g., his discussion of slavery, *id.* at 292.

154. See *infra* notes 155-87 and accompanying text.

155. See A. DE TOCQUEVILLE, *supra* note 150, at 245 ("By birth and interest a lawyer is one of the people, but he is an aristocrat in his habits and tastes . . . .")

156. A. DE TOCQUEVILLE, *supra* note 150, at 161. Tocqueville's reference to the two parties being "as old as the world itself" harkens back to classic political theory, particularly Aristotle. See ARISTOTLE, *THE POLITICS* 118-28, 149-68 (Penguin Books ed. 1962). Aristotle expressed the concept of aristocracy in an anthropomorphic analogy between mind and body (one that he used in other contexts as well):

If the mind is to be regarded as part of a living creature even more than its body, then too in cities we must regard the corresponding parts . . . I mean such things as fighting-qualities and all that belongs to the administration of justice, and over and above these, that counselling faculty which is political wisdom in action.

*Id.* at 157.

Less gently Aristotle goes on to say:

[T]he prime division of classes in a state is into the well-to-do and the property-less. Furthermore, owing to the fact that the one class is for the most part numerically small, the other large, these two appear as antagonistic classes. So constitutions reflect the predominance of one or the other of these and the two types of constitution emerge—democracy and oligarchy.

*Id.* at 158.

I am certainly not saying that American parties always have as their open or even their concealed aim to make aristocracy or democracy prevail in the country. I am saying that aristocratic or democratic passions can easily be found at the bottom of all parties . . . [and are] the nerve and soul of the matter.<sup>157</sup>

Tocqueville then identifies the legal profession with the "aristocratic" party, which is the antipode of the democratic tendency: "Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class . . . . [H]idden at the bottom of a lawyer's soul one finds some of the tastes and habits of an aristocracy."<sup>158</sup> These tastes and habits are "habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas . . . strongly opposed to . . . the ill-considered passions of democracy."<sup>159</sup> Tocqueville then describes the relation between lawyers' professional mentality and their function in the political process:

The exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgment of the crowd. Add to that they naturally form *a body* . . . . An elite body . . . .<sup>160</sup>

The profession's mentality and its functions give it a critical strategic position in American democracy, since "[t]he legal body is the only aristocratic element which can unforcedly mingle with elements natural to democracy and combine with them . . . ."<sup>161</sup>

A key element in Tocqueville's definition of this legal aristocracy is that it includes both judges and lawyers. He sees the professional bond between these two groups as the foundation of the profession's political identity and function. By implication, the fact that some members of the legal profession are on the bench and some are practitioners at the bar is a secondary differentiation:

It is at the bar or the bench that the American aristocracy is found. [T]he legal body forms the most powerful and, so to say, the only counterbalance to democracy . . . .

The courts are the most obvious organs through which the legal body influences democracy.

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157. A. DE TOCQUEVILLE, *supra* note 150, at 163-64.

158. *Id.* at 243.

159. *Id.*

160. *Id.* at 243-44 (emphasis in original).

161. *Id.* at 245.



The judge is a lawyer who, apart from the taste for order and for rules imparted by his legal studies, is given a liking for stability by the permanence of his own tenure of office. His knowledge of the law in itself has assured him already high social standing among his equals, and his political power as a judge puts him in a rank apart with all the instincts of the privileged classes.<sup>162</sup>

Such is the political analysis that is the predicate of Tocqueville's famous dictum: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."<sup>163</sup> After that dictum Tocqueville elaborates:

[T]he language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions . . . . [T]he lawyers constitute a power which . . . enwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire.<sup>164</sup>

Thus Tocqueville discerns a special language understood only by judges and lawyers, employed not only in court but in political discourse at large. Although the language is constituted from words familiar in American English, it involves special nuances and connotations: It is "Mandarin" English.<sup>165</sup> Another specific legal link between the bench and the bar is the exclusive right of members of the bar to have audience before the courts. That is, only lawyers "working in secret"<sup>166</sup> participate when "a political question . . . sooner or later turn[s] into a judicial one."<sup>167</sup>

As Tocqueville described it, the legal profession's other basic linkage—to property interests—derives from its services to the "wealthy classes."<sup>168</sup> The "wealthy classes" in a democracy are people who have turned to industry: "When . . . men are no longer distinguished, or hardly distinguished, by birth, standing, or profession; there is . . . hardly anything left but money . . . . Distinction based on wealth is increased by the disappearance or diminution

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162. *Id.* at 247.

163. *Id.* at 248.

164. *Id.*

165. Language is becoming increasingly well appreciated as a primary member of a set of cultural codes through which distinctions in class, 3 B. BERNSTEIN, *CLASS, CODES AND CONTROL* 123-35 (1975); gender, Gal, *Peasant Men Can't Get Wives: Language Change and Sex Roles in a Bilingual Community*, in *LANGUAGE IN USE* 292, 299 (J. Bangh & J. Sherzer eds. 1984); age, Helfvich, *Age Markers in Speech*, in *SOCIAL MARKERS IN SPEECH* 63, 98 (K. Scherer & H. Giles eds. 1979); race or ethnicity, Brown & Levinson, *Social Structure, Groups and Interaction*, in *SOCIAL MARKERS IN SPEECH*, *supra*, at 291, 328); and other differences between social groups and categories are created, expressed, and maintained.

166. A. DE TOCQUEVILLE, *supra* note 150, at 248.

167. *Id.*

168. *Id.* at 164.

of all other distinctions . . . . [L]ove of money chiefly turns men to industry.”<sup>169</sup>

Tocqueville does not develop the implications for political economy that might follow from this definition. However, some are fairly clear. The wealthy class Tocqueville discusses is engaged in the pursuit of enrichment through wealth-producing business ventures—not, for example, in pursuit of wealth through family alliances, military domination, or imperial adventures. It is a group whose members are actively engaged in business, not a class of rentiers or beneficiaries of inherited wealth. In an early capitalist economy this class consisted of business owner-operators; in a fully industrialized economy it includes the managerial element.<sup>170</sup>

In Tocqueville’s analysis this class, although economically significant, is politically inhibited and withdrawn. Fearful of popular hostility, it seeks to remain inconspicuous. Under the heading “Remains of the Aristocratic Party in the United States,”<sup>171</sup> Tocqueville observes:

Nowadays one may say that the wealthy classes in the United States are almost entirely outside politics . . . . Being unable to assume a rank in public life analogous to that which they occupy in private life, they abandon the former and concentrate upon the latter. They form, within the state, a private society with its own tastes and enjoyments.<sup>172</sup>

We now reach the linkage between the wealthy classes and the law (and thus the legal profession). The wealthy, noted Tocqueville, have a guarded appreciation of law:

[I]n America, the European ladder of power has been turned upside down; the wealthy find themselves in a position analogous to that of the poor in Europe: it is they who often mistrust the law . . . . In the United States, where the poor man rules, the rich have always some fear that he may abuse his power against them.

This . . . same reason which prevents the rich man from trusting the lawgiver also prevents him from defying his commands. Because he is rich he does not make the law, and because of his wealth he does not dare to break it.<sup>173</sup>

Thus, while the second constituent of the aristocratic party consists of the wealthy, this constituent is “almost entirely outside politics” and “form[s],

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169. *Id.* at 590-91.

170. *Cf.* A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312 (1932) (arguing that efficient management necessarily serves not merely owners of securities or managerial class itself but “all society”).

171. A. DE TOCQUEVILLE, *supra* note 150, at 164.

172. *Id.*

173. *Id.* at 222.

within the state, a private society," which "mistrust[s] . . . the lawgiver . . . [but] does not dare to break [the law]."

What political intermediary was available to this group of people, which was at the same time economically privileged and deeply fearful of the political process "where the poor man rules"? Tocqueville identified the legal profession, which can "unforcedly mingle with elements natural to democracy," as such an intermediary.

## 2. A "Republican" Aristocracy

It is important to contrast Tocqueville's view of aristocracy with what seems to be a widely shared contemporary misinterpretation of that concept. In present-day American usage, "aristocracy" signifies a class constituted by inheritance, endowed with unearned wealth and income, and privileged to remain in idleness. Its members enjoy their status by an accident of history and interject themselves in serious matters only occasionally and then merely as a matter of personal choice. This concept of an aristocracy calls up images of the English country house dilettantes of the Victorian era.<sup>174</sup>

Tocqueville knew that aristocracy in the classical sense had been abolished in America.<sup>175</sup> He recognized that there was no established church here, certainly not in the European form,<sup>176</sup> and that the professional military was relatively insignificant.<sup>177</sup> He remarked upon the virtual absence of a state bureaucracy.<sup>178</sup> These constituents—the church, the army, and the state bureaucracy—were the core of the "aristocratic element" in the European *Ancien Régime*, which was Tocqueville's frame of reference.<sup>179</sup> Yet Tocqueville assumes that an "aristocratic element" must exist even in a democracy, and finds it in the legal profession and in "those who have turned to industry." In Jeffersonian terms—perhaps compatible with democratic ideology—members of the legal profession would be a "natural aristocracy," as distinct from an inherited one.<sup>180</sup>

174. This conception of the aristocracy as dilettantes was absorbed into one version of the legal profession's traditional conception of itself. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (term "profession" refers to group of men pursuing learned art as common calling in spirit of public service—no less a public service because it may also be means of livelihood).

175. U.S. CONST. art. I, § 9, cl. 8 ("No title of nobility shall be granted by the United States . . .").

176. A. DE TOCQUEVILLE, *supra* note 150, at 271-75. Tocqueville's discussion of religion and religious sects is extensive, more so than his discussion of the courts and lawyers.

177. *Id.* at 621-33.

178. See, e.g., *id.* at 64, noting "the absence of what we would call government, or administration," in America.

179. See A. MAYER, *THE PERSISTENCE OF THE OLD REGIME* 80-81, 244 (1981).

180. T. JEFFERSON, *Aristocracy and Liberty*, in *THE COMPLETE JEFFERSON* 282, 283 (S. Padover ed. 1943) ("[T]here is a natural aristocracy among men. The grounds of this are virtue and talents. . . . There is also an artificial aristocracy, founded on wealth and birth, without either virtue or talents; for with these it would belong to the first class. The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society.").

In discerning an "aristocratic element" in America, it seems evident that Tocqueville had in mind the governing class of provincial France of which he was a descendant.<sup>181</sup> That class was intimately involved in local and regional government, agriculture, industry, preservation of the peace, and political and administrative relationships with authorities in central government and adjoining communities.<sup>182</sup> It was not a politically monolithic group, but was aligned in regional, religious, and political alliances and antagonisms. Nor was the aristocracy itself homogeneous: it was divided into gradations of position, place, and power.<sup>183</sup> However, its members shared a concern with management of authority and property,<sup>184</sup> and it had a functional interest in the stability of the community as a whole—an interest in perpetuating its overall position as "arbiters between citizens" through "the habit of directing."<sup>185</sup>

This is not far off as a description of the American legal profession, then and now. The legal profession performs essential—and "aristocratic"—functions in the spheres of both government and the marketplace. Expressed in the modern language of political economy, its function in the sphere of government is to impose legal constraints on the democratic impulses of the popularly elected legislature and executive. Its function in the economic sphere is to protect the assets and productive capability of business enterprise. In the political-economic system as Tocqueville perceived it, the legal profession was uniquely configured to perform these functions. Members of the legal profession occupied the bench, where virtually every "political question . . . sooner or later turn[s] into a judicial one." The judicial members of the profession maintained close affinity with the practicing bar, with whom they shared "an instinctive love for a regular concatenation of ideas . . . strongly opposed to . . . the ill-considered passions of democracy." And the practicing bar's professional work was primarily on behalf of the "wealthy classes" who otherwise were "almost entirely outside politics."

As long as the constraining influence of the judiciary could be maintained—and Tocqueville implied that it could<sup>186</sup>—then the risks of democratic impetuosity would be correspondingly mitigated. That, of course, is also what the Federalists had in mind.

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181. See, e.g., A. DE TOCQUEVILLE, *supra* note 150, at xxvi-xxvii (describing Tocqueville's aristocratic background).

182. See, e.g., R. BRIGGS, *EARLY MODERN FRANCE 1560-1715*, at 48-52, 56-65 (1977).

183. *Id.* at 61-65.

184. See, e.g., M. ANDERSON, *EUROPE IN THE EIGHTEENTH CENTURY* 46-58, 140-42 (3d ed. 1987); R. BRIGGS, *supra* note 182, at 48-52, 56-65 (1977); J. EGRET, *THE FRENCH REVOLUTION 1787-1788* at *passim*.

185. A. DE TOCQUEVILLE, *supra* note 150, at 243.

186. See, e.g., *id.* at 89-95 (discussing substantial powers of the American judiciary).

### B. *The Federalist Antecedent*

Tocqueville connected his conception of the legal profession as an aristocracy with the Federalists' goals in creating the Constitution.<sup>187</sup> The classic argument for constraining democracy was expressed by Madison in *The Federalist* No. 10. For obvious reasons, Madison cast the argument in democratic rather than aristocratic terms, but the analysis resonates with Tocqueville's.

The key term is "faction." Madison observed that "the friend of popular governments" (i.e., the friend of democracy) is necessarily alarmed by "the violence of faction."<sup>188</sup>

In Madisonian terms, the word "faction" did not simply describe a manipulating minority; Madison also warns against the power of an overbearing majority:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to *the rights* of other citizens, or to the permanent and aggregate interests of the community.<sup>189</sup>

The violence of faction is such that

the public good is disregarded in the conflicts of rival parties, and measures are too often decided, not according to the *rules of justice* and *the rights* of the minor party, but by the superior force of an *interested* and overbearing majority.<sup>190</sup>

The Federalist concern, of course, is not that popular government will *fail* to reflect popular sentiment, but that it *will* reflect popular sentiment to the detriment of rights, especially "private rights."<sup>191</sup> Such "rights" are defined by "rules of justice." In *The Federalist* No. 10, Madison does not say where and how the "rules of justice" are pronounced and enforced. It does not take much interpolation, however, to infer that this is done through the courts.

187. Tocqueville describes the basic positions of the two parties in relation to the Constitution: "The party which wished to restrict popular power sought specially to have its ideas applied in the federal Constitution, from which it gained the name of Federal. The other, which claimed to be the exclusive lover of liberty, called itself Republican." *Id.* at 162.

Looking at the relationship between these "parties" and the adoption of the Constitution, Tocqueville observed: "The period of Federalist power was, in my view, one of the luckiest circumstances attending the birth of the great American Union . . . [T]he still-extant federal Constitution is a lasting memorial to their patriotism and wisdom." *Id.*

188. THE FEDERALIST No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961) [all subsequent cites to *The Federalist* refer to this edition].

189. *Id.* at 78 (emphasis added).

190. *Id.* (emphasis added).

191. *Id.* at 80.

The relationship between rights and the courts is made clear by Hamilton in *The Federalist* No. 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the . . . Constitution void. Without this, all the reservations of particular *rights* or privileges would amount to nothing.<sup>192</sup>

In an ensuing passage Hamilton foreshadows the relationship Tocqueville discerned between lawyers' "habits of mind" and control of popular government:

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard . . . . [T]he firmness of the judicial magistracy . . . not only serves to moderate the immediate mischiefs of those [laws] which may have been passed but it operates as a check upon the legislative body in passing them . . . . This is a circumstance calculated to have more influence upon the character of our governments than but *few may be aware of*.<sup>193</sup>

Nowhere in *The Federalist* have I discovered a definition of the "few" as used here. Given the political objective of *The Federalist*—to gain widespread popular support for the Constitution—this is hardly surprising. Yet it does not take a great leap of inference to conclude that Hamilton and Madison had in mind the literate and influential members of American society who were concerned with the adoption of the Constitution. These notably included the legal profession.<sup>194</sup> In fact, it would be difficult to imagine that the "few" who "may be aware" of the influence of the "judicial magistracy," referred to in *The Federalist* No. 78, did *not* include the legal profession. In any case, this description directly corresponds what Tocqueville identified as the aristocratic party in the American Constitution.

### C. The Marxist Parallel

Tocqueville's analysis of the "aristocratic" party embraced not only power in government—with which the Federalists were directly concerned—but also control over economic resources—held by the "wealthy classes." In this respect, Tocqueville's analysis of political economy is more searching, or at least more candid, than that in *The Federalist*. Whereas *The Federalist* addresses the

192. THE FEDERALIST No. 78, at 466 (A. Hamilton) (emphasis added).

193. *Id.* at 470 (emphasis added).

194. Gibbons, *Judicial Review of the Constitution*, 48 U. PITT. L. REV. 963, 964 (1987).

relationship between democracy ("faction") and "rights" in political terms, Tocqueville does so in economic terms as well. Tocqueville posits that one constituent of the "aristocratic" party has control and management of wealth and industry, while another—the legal profession including the courts—works its will by placing constraints on majoritarian rule.

Tocqueville's implication seems to be that the aristocratic party's function in the economic sphere complements its function in the political sphere. That is, in the economic sphere the aristocratic party is engaged in facilitating the development of community wealth through the control of industry, while in the political sphere it exercises a restraining influence on the passions of the majority. This analysis, of course, responds to the same social phenomena that Marx observed at about the same time.<sup>195</sup> Indeed, read by a modern mind acculturated to Marxism, Tocqueville's analysis seems to have a strong Marxist flavor.

Specifically, Tocqueville seems to be "Marxist" in affirming that capitalist societies always contain a class structure and that a given society's political and economic systems will reflect its class structure. There is a fundamental difference, however, between the Marxist theory of class structure and Tocqueville's. The Marxist thesis is that class structure in society is innately exploitive and therefore illegitimate.<sup>196</sup> Tocqueville's thesis, on the other hand, is that a division between the aristocratic and democratic elements in society is natural, permanent, functionally necessary to a civilized commonwealth, and therefore legitimate.

Adequate development of a contemporary justification for an "aristocratic" element in a political democracy would require much deeper study in political economy, focussing on the role of elites as structural elements of society. If the possibility of such a justification is accepted, however, then an aristocratic party, in the sense used by Tocqueville, could be instrumental in maintaining a liberal political order with a productive economy.

To my knowledge, this issue has not been systematically addressed since early in this century, when it was a central concern of Pareto and other theorists.<sup>197</sup> The question has virtually disappeared from contemporary political analysis. Indeed, today the notion of a legitimate aristocratic element is anathe-

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195. K. MARX, *CAPITAL, A CRITIQUE OF POLITICAL ECONOMY* 348 (1957) (arguing that it is impossible for the working class to buy its way out of its structural position in the circulation of capital and therefore that a class structure is inevitable so long as private ownership of property is permitted).

196. See, e.g., *CAPITAL AND OTHER WRITINGS BY KARL MARX* 322 (M. Eastman ed. 1932) (in *Communist Manifesto*, declaring that "[t]he modern bourgeois society that has sprouted from the ruins of feudal society, has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones.")

197. See 1 V. PARETO, *MIND AND SOCIETY: A TREATISE ON GENERAL SOCIOLOGY* §§ 829-830, at 492-93 (1963) (criticizing economic determinism and other eschatologies); 2 *id.* §§ 2025-59, at 1419-32 (setting out theories of a permanent class structure and continual "circulation of elites"); V. PARETO, *Les Systemes Socialiste*, in *SOCIOLOGICAL WRITINGS* 123, 132 (S. Finer ed. 1976) ("At the present time in our societies, the adhesion of new elements indispensable to the subsistence of the elite comes from the lower classes . . .").

ma virtually everywhere, and for a simple reason: it is considered incompatible with equality of personhood. The presupposition of political equality underlies all contemporary political ideology—democratic capitalism of the West, socialist “command and control” regimes now collapsing in the East, and the various political regimes of the Third World. Tocqueville’s basic premise—that there are and necessarily will be definite class distinctions among persons in a non-primitive society, and that these distinctions will be reflected in a society’s political structure—is simply not discussible in politically correct conversation.

However, this does not erase the possibility that Tocqueville might be correct. As an empirical matter, he could be right that the class division is a permanent, not a transitory, characteristic of complex societies.<sup>198</sup> As a constitutional matter, Tocqueville could be right that the “aristocratic” element—composed of a legal profession or other groups—serves the long-run good of society if it is suitably organized and restrained.<sup>199</sup>

## VI. A THEORY OF THE LEGAL PROFESSION’S “CRISIS”

American political and constitutional theory has not dealt directly with the question of the legal profession’s aristocratic role in our system of government. And clearly, political and constitutional theory that does not acknowledge the existence of a legitimate “aristocratic” element cannot address constitutional constraints on such an element. Our constitutional theory does address the problem of constraints on oppressive majoritarianism, but it does not identify the element which exercises that counter-majoritarian control. According to Tocqueville, that element is the legal profession.

Tocqueville did not clearly explain the functional relationship between the legal profession and the basic problems of political economy to which the division between aristocratic and democratic elements is a response. However, the implicit logic of his analysis as applied in this country seems evident.

Since the adoption of the Constitution, the basic function of the legal profession in the United States has been to reconcile the constitutional necessities of an economic system devoted to the production of wealth through business enterprise with a political system that is predominantly democratic. A related function is to reconcile majoritarian politics with protection of the rights of religious and other minorities.<sup>200</sup> The lawyer’s “practice” of bringing about

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198. If Tocqueville is correct, Eastern Europeans are headed for a serious disappointment in their quest for classless democracy.

199. See, e.g., A. DE TOCQUEVILLE, *supra* note 150, at 242-48 (discussing aristocratic tastes of lawyers and noting that their “prestige . . . and their permitted influence in the government are now the strongest barriers against the faults of democracy”)

200. The Constitution rests on a political theory that has strong appeal to the ordinary citizen in a socially heterogeneous polity. The ordinary citizen constitutes part of a majority vis-à-vis the “wealthy classes.” However, the society in which he finds himself is heterogeneous not only in wealth but also in religion, culture, regional affiliation, and ethnic composition. Hence, the average American is both a member of the majority and a member of an “insular minority.” *United States v. Carolene Prods. Co.*, 304 U.S. 144,



these accommodations embodies the legal profession's primary set of skills and expresses its primary role in the American social system. This role was actualized in our society by linking the legal profession to the courts, on one end, and to business enterprise on the other end.

Until the last generation or so public opinion did not successfully challenge the profession's mediating function. This conception of its role gave the legal profession a useful place in society and gave lawyers a sense of meaning and common identity.

Over the last half century, however, the legitimacy of the business enterprise system itself has been severely undercut by that system's apparent economic failure in the Great Depression, by the Watergate scandals, and by cumulative and intensified attack on capitalism in the name of democratic politics. Over the same period the courts, particularly the Supreme Court, moved away from their long-established practice of using constitutional law to constrain democratic politics for the protection of business.<sup>201</sup> Under the aegis of the equal protection clause the Supreme Court affirmatively pursued a program of democratic reform going well beyond democratic sentiment as expressed in legislatures.<sup>202</sup> The Rehnquist Court has terminated this program, out of deference to democratic politics. As a result, attacks on the "elitism" which the Warren Court personified are now coming from the right, based on antipathy to judicial activism, as well as from the left, based on antipathy toward business.

These political and economic cleavages have weakened the legal profession's place in the American political system and have affected the profession's legitimacy. The effect has been no less demoralizing for not being acknowledged. The legal profession no longer enjoys an unchallenged sense of purpose and worth in its traditional practice of mediating through the courts between business enterprise and popular politics. The practice of the profession is no longer intelligible in the terms that prevailed in the century and three quarters

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152 n.4 (1938). In the latter posture, the ordinary citizen, like members of the "wealthy classes," will sometimes find himself at the mercy of majority "factions." The institution of judicial review protects minority "rights" against "faction." These rights include not only the legal protection of religious and regional minorities, but also protection of the rights of the minority consisting of "wealthy classes." Hence, the Constitution implicitly endorses the concept of the legal profession—both bar and bench—as a nonpopular institution for which there is general popular support.

201. The *Carolene Products* footnote can be taken as marking the historical point. *Id.*

202. See, e.g., *United States v. Mississippi*, 380 U.S. 128 (1965) (voter registration case); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (lunch counter desegregation); *Reynolds v. Sims*, 377 U.S. 533 (1964) (Alabama legislative apportionment); *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (school desegregation); *Baker v. Carr*, 369 U.S. 186 (1962) (Tennessee legislative apportionment); *Smith v. Bennett*, 365 U.S. 708 (1961) (indigent prisoners' right to equal protection); *McCrary v. Indiana*, 364 U.S. 277 (1960) (indigent prisoners' rights); *Cooper v. Aaron*, 358 U.S. 1 (1958) (school desegregation); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (juror exclusion by race case); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent prisoners' rights); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (school desegregation); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (school desegregation); *Barrows v. Jackson*, 346 U.S. 249 (1953) (real property restrictive covenant case); *Terry v. Adams*, 345 U.S. 461 (1953) (voting rights).

between *Marbury v. Madison*<sup>203</sup> in 1803 and *Roe v. Wade*.<sup>204</sup> By the same token, the profession no longer presupposes its own identity as the aristocratic element in such a constitutional structure.<sup>205</sup> Its governing norms no longer represent the shared understandings of a substantially cohesive group. They are simply rules of public law regulating a widely pursued technical vocation whose constitutional position is now in doubt.

What do these transformations imply for the future of legal ethics? "Legalized" regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. As a consequence, the dominant normative institution for the legal profession will no longer be "the bar," meaning the profession as a substantially inclusive fraternal group. The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance. In the emergent "legalized" era, increasingly dominant power reposes in government regulatory authorities, including courts, legislatures, and disciplinary agencies.

This is not to say that leadership in the profession will disappear. But leadership goes where the action is. As an inclusive fraternal relationship plays a decreasing role in the profession at large, organization and leadership will emerge in other professional settings. It seems evident that the most effective nonlegal governance in the profession of the future will be through the law firm and subspecialty practice fields. Most lawyers now practice in multilawyer work groups, including independent law firms and the law departments of governments and private organizations. Specialized practice now predominates, including tribunal practice before courts and agencies with specific regulatory jurisdiction. For better or worse, the law firm and specific tribunals, not "the bench and the bar," have become the centers of professional relationships among the lawyers. Whether "the bar" as such can remain a coherent entity seems increasingly doubtful.

However, at a more fundamental level, the courts will continue to be an indispensable instrument for ordering and clarifying norms and supplying final

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203. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1 (1978) (arguing that not only should Court make policy, but once one accepts role of Court as legislature, other premises follow).

204. 410 U.S. 113 (1973).

205. Cf. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 7 (1988) (*Marbury* sustains the broadest claims of authority ever made by or on behalf of the courts). This article by Professor Gordon, which I much admire, undertakes to analyze the problem of the legal profession's ethos along a path that is similar to the one here, but which leads in a quite different direction. Like many thoughtful criticisms of the legal profession, Professor Gordon's analysis seeks to project a coherent concept of the legal profession as socially useful. However, the projection seems to me to discount the very evidence that Professor Gordon has so usefully adduced in works such as Gordon, *supra* note 26. The conception of a legal profession that somehow operates free of an economic and political power base ignores what most lawyers do in their work most of the time, and depends upon implausible political-economic assumptions. Putting the point bluntly but respectfully, such a conception seems to me to fantasize about the legal profession no less, and perhaps more, than the profession may fantasize about itself.

specification of social choice in a wide range of political and economic issues. They will do this because no upheaval is in sight that will reduce the anarchy in Congress, the conflicts between Congress and the other federal branches, the conflicts between the federal government and the states, and the divergences of interest between regions, ethnic groups, religious sects, and economic sectors in the nation at large.<sup>206</sup> It is another question whether (to use Tocqueville's terms) the legal profession will remain a key "aristocratic" influence—one that tries to contemplate the past while acting in the present, and to take account of democratic desires while protecting minority rights. If Tocqueville's assumptions about political economy are correct, exercise of that influence requires cohesiveness built upon political strength combined with constitutional legitimacy. It is not clear that the legal profession still has these qualities.

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206. With the apparent end of the Cold War, we shall no longer have the unifying influence, such as it was, of the struggle with the Soviet Union. Hence, the centrifugal forces in our domestic politics will probably have greater moment than in the last 50 years.